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IN THE

Supreme Court of the United States

October Term, 1961.

No. 709.

B. NATHANIEL RICHTER and ELWOOD S. LEVY,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No.

B. NATHANIEL RICHTER AND ELWOOD S. LEVY,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

A. The Opinion Below.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 190 F. Supp. 159 (E. D. Pa. 1960). The opinion of the United States Court of Appeals for the Third Circuit is reported at — F. 2d — (3rd Cir. 1961), and is appended hereto at page 13.

B. Grounds Upon Which Jurisdiction of This Court Is Invoked.

1. The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on November 16, 1961.

2. There was no order respecting a rehearing or the granting of an extension of time to file this petition.

3. The statutory provision conferring jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 28 U. S. C. Section 1254(1).

C. Questions Presented for Review.

1. Where the services of attorneys retained by an injured railroad company employee result in the recovery of a sum of money as damages from the employer railroad company under the provisions of the Employers' Liability Act, and where by reason of the provisions of § 12 of the Railroad Unemployment Insurance Act a portion of such recovery is paid over to the Railroad Retirement Board in satisfaction of its subrogation interest, does the Tucker Act, 28 U. S. C. § 1346, vest jurisdiction in the United States District Court to adjudicate a suit brought by such attorneys against the United States wherein it is claimed that a portion of said payment to the Railroad Retirement Board was made by reason of a misinterpretation of the provisions of the Railroad Unemployment Insurance Act and should properly have been paid to the employee's attorneys who were responsible for creating such fund which benefited the United States?

2. Where the services of attorneys retained by an injured railroad company employee result in the recovery of a sum of money as damages from the employer railroad company under the provisions of the Employers' Liability Act and where by reason of the provisions of § 12 of the

Railroad Unemployment Insurance Act a portion of such recovery is paid over to the Railroad Retirement Board, are such attorneys entitled to recover from the United States a reasonable attorneys' fee out of such fund paid to the Railroad Retirement Board for services rendered by the attorneys in creating the fund for the benefit of the United States?

D. Statutes Involved.

Plaintiffs seek to base jurisdiction upon the Tucker Act as codified in § 1346 of the Judicial Code, 62 STAT. 933, 28 U. S. C. § 1346 (1958), which provides in part that,

> **"(a) The Districts Courts shall have original jurisdiction, concurrent with the Court of Claims, of:**
>
> **(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."**

In remitting the settlement consideration to the plaintiffs who as attorneys represented the railroad employee in the litigation under the Federal Employers' Liability Act, the railroad withheld a sum of money and paid it over to the Railroad Retirement Board pursuant to a lien filed with the railroad by the Board under subsection (o) of § 12 of the Railroad Unemployment Insurance Act of June 25, 1938, c. 680, 52 STAT. 1107, as added by § 323 of the Act of July 31, 1946, c. 709, 60 STAT. 739, 740; 45 U. S. C. § 362(o) which provides:

> **"Benefits payable to an employee with respect to days of sickness shall be payable regardless of the**

liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement."

E. Statement of Case.

This is a civil action brought under the provisions of the Tucker Act, 28 U. S. C. § 1346(a)(2) against the United States for recovery of a portion of certain funds which Plaintiffs allege were paid to an agency of the United States by reason of a misinterpretation of an Act of Congress.

Plaintiffs represented, on a contingent fee basis, one Peter J. Urban, an employee of the Pennsylvania Railroad, in a proceeding against the Railroad under the Federal Employers' Liability Act. In this suit for damages arising out of injuries sustained by Urban in the course of his employment by the Railroad Plaintiffs were responsible for the recovery from the Railroad of the gross sum of $16,800.00. Prior to this recovery the Railroad Retirement Board had paid Urban $2,210.00 in benefits under the Railroad Unemployment Insurance Act. By reason of an interpretation of the provisions of Section 12 of the Railroad Unemployment Insurance Act—an interpretation that Plaintiffs contend was in error—the full sum of $2,210.00 was deducted by the Railroad from the gross recovery of $16,800.00 prior

to disbursement of the balance of the recovery to the employee and his attorneys. This $2,210.00 was paid over by the Railroad directly to the United States through the Railroad Retirement Board.

Urban paid $4,639.41 to Plaintiffs as a contingent fee for services rendered by Plaintiffs in securing for him the net recovery of $13,918.25. This net recovery of $13,918.25 is equal to the gross recovery of $16,800.00 less litigation expenses and costs of $671.75 and the $2,210.00 paid by the Railroad directly to the United States through the Railroad Retirement Board.

Plaintiffs allege that in paying over the $2,210.00 to the United States through the Railroad Retirement Board, the Railroad, by reason of an erroneous interpretation of the provisions of the Railroad Retirement Act, failed to deduct from the $2,210.00 the sum of $736.67. This latter sum of $736.67 should have been paid by the Railroad to Plaintiffs rather than to the Board since it represents moneys due Plaintiffs as consideration for services rendered by the Plaintiffs which benefited the United States of America by creating the fund of $2,210.00 for the Railroad Retirement Board. Plaintiffs allege that the reasonable and proper value of these services of benefit to the United States was $736.67.

Demand having been made by Plaintiffs upon the Board for $736.67 and refused by the Board, Plaintiffs filed a Complaint against the United States for the payment over of these moneys. The United States filed a Motion to Dismiss the Complaint alleging that the court lacks jurisdiction over the subject matter, the United States has not consented to be sued in the action and that the Complaint fails to state a claim upon which relief can be granted.

On December 29, 1960 the District Court dismissed Plaintiffs' Complaint for lack of jurisdiction. On November 16, 1961 the Court of Appeals affirmed the District Court.

F. Reasons for Granting the Writ.

1. The Decision of the Court of Appeals on the Jurisdictional Issue Is in Conflict With Decisions of Other Courts of Appeals and of the Court of Claims.

The jurisdictional issue is whether, under the Tucker Act, a Federal District Court may entertain a suit involving the construction of an Act of Congress and seeking to secure payment over from the United States of funds which Plaintiffs contend are legally due them but which were previously paid to the United States under color of the Act of Congress being construed.

Numerous Federal cases support Plaintiffs' contention that Tucker Act jurisdiction exists either if the funds sought by Plaintiffs were paid to the United States under color of an Act of Congress or if the decision of the case involves the construction of such an Act. See: *Gmo. Nichous v. United States*, 153 F. Supp. 428, 432, 139 Ct. Cl. 605 (1957); *Clapp v. United States*, 117 F. Supp. 576, 127 Ct. Cl. 505, *cert. denied*, 348 U. S. 834, 75 S. Ct. 55, 99 L. Ed. 658 (1954); *Eversharp v. United States*, 125 F. Supp. 244, 129 Ct. Cl. 772 (1954), 147 F. Supp. 502, 135 Ct. Cl. 717 (1956); *Kirkendall v. United States*, 31 F. Supp. 766, 90 Ct. Cl. 606 (1940); *Christie Street Commission Co. v. United States*, 136 Fed. 326 (8th Cir. 1905); *Sinclair Navigation Co. v. United States*, 32 F. 2d 90 (5th Cir. 1929); *Carrisa v. United States*, 106 F. 2d 707 (9th Cir. 1939); *Ross Packing Co. v. United States*, 42 F. Supp. 932 (E. D. Wash. 1942); Cf. *Cohens v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257, 285 (1821); *United States v. Rothstein*, 187 Fed. 268 (7th Cir. 1911). The Court of Appeals in the instant case apparently believed that because Plaintiffs' claim requires the application of an equitable principle these cases are inapposite. This equitable principle of propertional contribution is that one who creates a fund which another is to share by way of subrogation is entitled to reasonable compensation for his services out of the subrogated fund. See: *Furia v. City of Philadel-*

phia, 180 Pa. Superior Ct. 50, 118 A. 2d 236 (1955). The Circuit Court thus appears to hold that in order for an Act of Congress to be the basis of Tucker Act jurisdiction such act must by its terms create a cause of action. None of the cases previously cited so requires. In so conditioning Tucker Act jurisdiction the Court of Appeals in the instant case is creating a new principle of law inconsistent with that previously applied by the Court of Claims and by the Courts of Appeals for the Fifth, Seventh, Eighth and Ninth Circuits.

The ruling of the Court of Appeals in this case is not consistent with the trend toward a liberal construction of waivers of sovereign immunity. As the Court stated in *Compagnie General Transatlantique v. United States*, 21 F. 2d 465, 466 (S. D. N. Y. 1927), *aff'd* 26 F. 2d 195 (2d Cir. 1928), "To limit the recovery in cases 'founded' upon a law of Congress to cases where the law provides in terms for a recovery would make the provisions of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. 'Founded' must therefore mean reasonably involving the application of a law of Congress".

2. The Decision of the Court of Appeals Involves Two Important Questions of Federal Law Which Have Not Been But Should Be Settled by This Court.

(a) The Jurisdictional Question.

This Court has never considered the applicability of the "Act of Congress" jurisdictional criteria of the Tucker Act to a claim involving the application of an equitable principle. This Court has construed the term "contract" as used in the Tucker Act jurisdictional criteria not to include those equitable claims that are sometimes characterized as being "contracts implied in law." It is significant that the earlier cases so limiting the application of the term

"contract" as a criterion of Tucker Act jurisdiction developed out of attempts by claimants to characterize tort claims as involving an "implied in law contract" to circumvent the clear intention of the Tucker Act that the United States should not be subject thereunder to tort liability.

This Court and lower Federal courts have on numerous occasions recognized the validity of equitable principles as a basis of claim against the United States. *United States v. State Bank*, 96 U. S. 30, 24 L. Ed. 647 (1877); *United States v. MacDaniel*, 32 U. S. (7 Peters) 1, 8 L. Ed. 587 (1833); *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518 (1877). In *United States v. Lawson*, 101 U. S. 164, 169, 25 L. Ed. 860 (1879) in affirming the award by the Court of Claims repaying monies to a Collector of Customs that he had previously paid into the Treasury of the United States but that were rightfully his to keep, the Court stated that in equity and good conscience the monies that were wrongfully exacted should be repaid by the government.

The term "founded upon" as used in the Tucker Act should not be confused with the term "arising under" as used in the Judicial Code "Federal Question" jurisdictional articulation. The rationale underlying the various cases limiting the scope of the term "arising under" in the latter context has no application to a determination of the scope of the Tucker Act waiver of sovereign immunity. The only rational correlation of the various cases pertaining to the meaning of the term "arising under" is that the meaning of the term varies with the context.[1]

Plaintiffs here contend that the equitable principle of proportional contribution must be the basis of a construction

1. See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 163 (1953). (To ascribe the same meaning to the term "arising under" in various contexts "merely because the terminology is the same, would be to allow form to eclipse problems of substance"); *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U. S. 582, 613-615, 69 Sup. Ct. 1173, 1188-1189 (1949). Chadbourn and Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942).

of the subrogation provisions of the RUIA. The issue raised by the instant litigation involves the manner of application of the right of subrogation—remedial details. The Court must in the instant litigation give form to the Congressional declaration of the propriety of subrogation. The instant litigation thus involves a dispute respecting the construction and effect of § 12(o) of the RUIA, and, consistent with the cases cited in the previous portion of this brief in regard to the jurisdictional issue, this Court should find that there is jurisdiction in the District Court to adjudicate Plaintiffs' claim.

(b) The Substantive Question.

The substantive issue of this case is whether a portion of the funds paid the Railroad Retirement Board should properly have been paid to Plaintiffs rather than to the Board. The determination of this issue requires an interpretation of Section 12(o) of the Railroad Unemployment Insurance Act (RUIA). Plaintiffs contend that although Congress set forth in Section 12(o) the general principle that there should be subrogation, it left the manner of application of this principle to the courts to be developed consistent with well established principles which include the proportional imposition of equitable charges against the subrogated fund. The Court of Appeals appears to have based its determination on the theory that the payment sought by Plaintiffs would be proper only if it were specifically authorized by statute. Plaintiffs do not seek a redrafting or "tinkering" with the provisions of the Railroad Unemployment Insurance Act. Plaintiffs merely ask that in filling the interstices in the statute the Courts apply established equitable principles. In an analogous situation the Court of Appeals for the Fifth Circuit in *Voris v. Gulf Tide Stevedores*, 211 F. 2d 549 (5th Cir. 1954) did just what Plaintiffs seek in this respect when it applied equitable principles to the subrogation required by the Longshoremen's

and Harbor Workers' Compensation Act (LHWCA).[2] In *United States v. Atlantic Coast Line Railroad Company*, 237 F. 2d 137 (4th Cir. 1956) the Court applied the equitable doctrine of exoneration to Section 12(o) of the Railroad Unemployment Insurance Act. In doing so the Court stated, at 237 F. 2d 141, that, "Equitable principles should be applied in enforcing this statute, which in effect creates equitable liens and assignments. . . ." In *United States v. State Bank*, 96 U. S. 30, 24 L. Ed. 647 (1877), this Court acknowledged that it must consider equitable principles as the basis of a claim against the United States. In *Chapman v. Hearst*, 296 U. S. 526, 529 (1936) this Court looked to the equitable principles of suretyship in determining the rights of a subrogated insurer under the LHWCA.

Both the Federal Employees Compensation Act (FECA) referred to by the Court of Appeals and the Longshoremen's and Harbor Workers' Compensation Act involve situations somewhat analogous to that considered by Section 12(o) of the Railroad Unemployment Insurance Act which is here involved. In all three Acts reimbursement is allowed only where there is recovery against a third party. But the FECA and LHWCA are both substantially more articulate and more detailed in considering the manner of subrogation and the rights incident thereto. Section 27 of the FECA establishes a subrogation pattern that varies from that generally applied in other circumstances. Since in the FECA Congress intended such an atypical subrogation pattern it was clearly necessary that it be specifically articulated by the statute as it was. The failure of Congress to be articulate in Section 12(o) of the RUIA requires reference to equitable principles usually applicable to a subrogated fund.

It has always been a cardinal rule of equity to impose the burdens of producing a common recovery proportionately upon those who benefit from the recovery. *Trustees*

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2 *Evans v. Dudley*, 295 F. 2d 713 (3rd Cir. 1961), cited by the Court of Appeals involved an attempt to modify the specific language of the statute and is thus not applicable.

v. Greenough, 105 U. S. 527, 26 L. Ed. 1157 (1882); *Central Railroad v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387 (1885); *Sprague v. Ticonic National Bank*, 307 U. S. 161, 59 Sup. Ct. 777, 83 L. Ed. 1184 (1939); *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F. 2d 233 (8th Cir. 1928); *Doherty v. Bree*, 262 F. 2d 20 (D. C. Cir. 1958), *cert. denied*, 359 U. S. 934 (1959). Since subrogation is an equitable principle courts have consistently applied the doctrine of proportional contribution in situations involving subrogation analogous to that of the instant case. *Furia v. City of Philadelphia*, 180 Pa. Superior Ct. 50, 118 A. 2d 236 (1955); *Meehan v. City of Philadelphia*, 184 Pa. Superior Ct. 652, 136 A. 2d 178 (1957). The only exceptions to this rule have arisen where a statute specifically provides for a pattern of contribution different from that which would result from the normal application of equitable principles.

The term "to the extent of" as used in 12(a) of the RUA establishes a variable rather than an absolute and is thus declarative of the basic principle of subrogation that the outside limit of recovery is the amount previously advanced by the subrogee. At various stages of the instant litigation the Government has admitted that it does not consider the term "to the extent of" to refer always to the specific amount of the reimbursement even though there is a sufficient fund. It has admitted that it is proper, upon recovery from a third party, for the cost of medical care, hospital and legal expenses to be deducted from the total fund prior to the proceeds being remitted to the Board. The issue not considered by the Court of Appeals is whether it is more consistent with settled principles of statutory construction to permit deduction of expenses, including legal fees, from the total fund even if it will result in reducing the subrogee's interest as the Government suggests, than to permit a pro rata deduction of such expenses as suggested by Plaintiff. Neither method is specifically provided for by the statute. The United States is of course subject to the

same equitable obligations as any other party litigant. *United States v. National City Bank of New York*, 83 F. 2d 236 (2d Cir.), *cert. denied*, 299 U. S. 563 (1936).

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,563

B. NATHANIEL RICHTER AND ELWOOD S. LEVY,
Appellants

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 2, 1961

Before GOODRICH, STALEY and SMITH, *Circuit Judges.*

Opinion of the Court.

(Filed November 16, 1961)

By GOODRICH, *Circuit Judge.*

The plaintiffs effected a settlement with a railroad in a Federal Employers' Liability Act case and paid part of the recovery to the United States under statutory provision. They now claim counsel fees against the Government on that part of the settlement paid to it. Plaintiffs lost in the court below. 190 F. Supp. 159 (1960).

The facts are undisputed. The plaintiffs, as lawyers, secured on behalf of an employee of the Pennsylvania Railroad the sum of $16,800. The railroad, in satisfaction of a lien of the Railroad Retirement Board, paid the United

States $2,210. This sum represented the amount of benefits previously paid by the United States to the employee as compensation for disability arising from the accident. The remainder of the settlement was paid to the appellants who, in accordance with a contingent fee arrangement, retained $4,639.41 and turned the remainder over to the injured employee. What the appellants now want from the United States is one-third of what was paid to the Government pursuant to the provisions of the Railroad Unemployment Insurance Act.

The plaintiffs base their claim on the Tucker Act, 28 U. S. C. § 1346(a)(2). This gives a district court jurisdiction in claims against the United States founded upon an act of Congress or upon either express or implied contract with the United States.[1] The argument for the appellants suggests that the district judge denied them relief on the basis that there was no implied contract with the United States within the meaning of the Tucker Act. They now say that this is not the theory of their case at all. In their words, "they depend upon the 'founded upon an Act of Congress' provision of the Tucker Act jurisdictional declarations."

The relevant portion of the Railroad Unemployment Insurance Act provides that the Board is entitled to reimbursement from any damages paid to an employee through suit on or settlement of any liability.[2]

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1. The wording of the subsection is as follows:

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

2. Railroad Unemployment Insurance Act § 12(*o*), 45 U. S. C. A. § 362(*o*):

"Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to

The act itself makes no provision for counsel fees for those who effect the recovery for the injured workman. Nor does the act make any statement against counsel fees. The section referred to obviously is to protect the interest of the United States.[3] The plaintiffs say, however, that, even though the act does not provide for an attorney's fee, they should be allowed to recover one either under Pennsylvania law or general federal equity principles. The theory is that the attorney who, by efforts, created the fund should be entitled to reimbursement from the Government on the principle of preventing unjust enrichment. RESTATEMENT, RESTITUTION §§ 1, 105(2).

The minute this argument is made, however, it puts the claim outside the Tucker Act altogether. The claim is then based not upon a statute of the United States, but rather on general equitable principles. There is no basis in the Tucker Act at all for the assertion of these. In spite of the multitude of citations with which we have been deluged, the point seems to us perfectly clear.

Then it is suggested that, even though the act does not expressly provide for attorneys' fees in this case, the appellant should be entitled to a fee. The employee, it is said,

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such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement."

3. The extent of this interest is shown in figures cited to us by government counsel. The Government states that the Board, by virtue of § 12(*o*), has been able to recover almost ten per cent of the sickness and maternity benefits paid out under the Railroad Unemployment Insurance Act. At the end of the fiscal year 1958-59, the cumulative benefits disbursed by the Board totalled $500,000,000, while the total § 12(*o*) reimbursement was $39,294,000.

is the only one who can retain an attorney to benefit both himself and the Board. Therefore, since the employee did so and did benefit both the Board and himself through the lawyer's efforts, the lawyer by proper implication from the act should be paid.

We find no basis for taking any such liberty with the statute. What we are in effect asked to do is to write in a provision which is not there. We think we are no more entitled to redraft the Railroad Unemployment Insurance Act than we are to tinker with a provision in the Internal Revenue Code. *Cf. Evans v. Dudley*, No. 13559, 3d Cir., Nov. 8, 1961. There is nothing in the legislative history to which we are cited that says anything for or against attorneys' fees in this situation. Congress when it desires to make provision for attorneys' fees knows perfectly well how to do so, as it has in the Federal Employees' Compensation Act [4] and an abundance of other situations.[5] It has not done so here and we do not think it a proper subject for court action.

The judgment of the district court will be affirmed.

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4. 5 U. S. C. A. §777 provides that, if a compensable injury creates a legal liability in some person other than the United States and a beneficiary entitled to compensation under the act recovers damages therefor from that other person, the beneficiary "shall, *after deducting costs of suit and a reasonable attorney's fee*, refund the amount of compensation received or to be received from the United States." (Emphasis added.)

5. For example, Congress has made specific provision for the recovery of attorneys' fees in various types of private actions which might be said to be affected with a public interest. See 15 U. S. C. A. § 15 (suits by persons injured by violations of the antitrust laws); 15 U. S. C. A. §77www (suits against persons filing false and misleading statements under the Trust Indenture Act); 49 U. S. C. A. § 16(2) (proceedings to enforce orders of the Interstate Commerce Commission).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,563.

B. NATHANIEL RICHTER AND ELWOOD S. LEVY,
Appellants,

vs.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, STALEY and SMITH, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

/s/ IDA O. CRESKOFF,
Ida O. Creskoff,
Clerk.

November 16, 1961

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No. 709

In the Supreme Court of the United States

OCTOBER TERM, 1961

B. NATHANIEL RICHTER AND ELWOOD S. [illegible],
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, Jr.,
Assistant Attorney General,
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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 190 F. Supp. 159. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 13-16) is not as yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1961 (Pet. App. 17). The petition for a writ of certiorari was filed on February 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly dismissed petitioners' claim for attorneys' fees on the ground that it was not within the jurisdiction conferred by the Tucker Act.

2. Whether the amount paid to the United States in satisfaction of its lien under Section 12(o) of the Railroad Unemployment Insurance Act is subject to a charge for attorneys' fees.

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2), provides in pertinent part as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * * * * *

Section 12(o) of the Railroad Unemployment Insurance Act, 45 U.S.C. 362(o), provides as follows:

> (o) Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or

other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement.

STATEMENT

Petitioners, members of a law firm in Philadelphia, were retained on a contingent fee basis by a Pennsylvania Railroad employee to prosecute a claim against the railroad under the Federal Employers' Liability Act for injuries sustained by him in the course of his employment. In March 1960, petitioners obtained by settlement a gross recovery of $16,800. The railroad, in satisfaction of a lien of the Railroad Retirement Board, established pursuant to Section 12(o) of the Railroad Unemployment Insurance Act (RUIA), *supra*, paid the United States $2,210, representing the amount of benefits previously paid by the United States to the employee on account of disability arising from the accident. The remainder of the agreed settlement (*i.e.*, $14,590) was paid to petitioners and the employee. In accordance with their contingent fee arrangement, petitioners retained $4,639.41 of this amount, representing one third of the

net recovery after litigation expenses and the lien of the Board had been deducted.

Thereafter, petitioners brought this suit. The complaint asserted that the lien payment to the United States was made possible by their efforts and legal services; and that they were entitled to payment for the reasonable value of such services, i.e., $736.67 (one-third of the amount of the lien recovery). Judgment against the United States in that sum, together with interest, was demanded. Jurisdiction was claimed under the Tucker Act, 28 U.S.C. 1346(a)(2).

The United States moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. The basis of the motion was (1) that the complaint, on its face, showed that petitioners' claim was not founded upon an act of Congress or a contract implied in fact and, therefore, was not cognizable under the Tucker Act, and (2) that the RUIA does not permit assessment of attorneys' fees against the amount received by the Board in satisfaction of its Section 12(c) lien. The district court accepted the government's jurisdictional contention, granted the motion and entered judgment dismissing the complaint. The court of appeals affirmed (Pet. App. 13-16).

ARGUMENT

The courts below held that petitioners' claim was based on Pennsylvania law or general equitable principles and was therefore not cognizable under the Tucker Act as one founded upon an act of Congress

or an implied contract with the United States. In addition, they determined that there was no statutory warrant for imposing attorneys' fees upon the amount of money paid to the United States as reimbursement for sickness benefits paid under the Act. We submit that these holdings are clearly correct and do not conflict with decisions of other courts. Hence, there is no basis for review by this Court.

1. The Tucker Act gives the district court jurisdiction over claims "founded either upon * * * any Act of Congress * * * or upon any express or implied contract with the United States." Judged upon its face, as it must be (*Gully* v. *First National Bank*, 299 U.S. 109, 113), petitioners' complaint (attached as an Appendix, *infra*, pp. 13–15) falls within neither head of statutory jurisdiction.

The complaint makes no reference whatsoever to the Railroad Unemployment Insurance Act, the "Act of Congress" upon which petitioners now assert their claim is founded. Nor does it allege facts from which the district court could have found a contract with the United States, either express or implied in fact.[1] Insofar as is pertinent here, the complaint alleges only (Appendix, *infra*, p. 15):

> 10. In paying over the sum of $2,210.00 to the UNITED STATES through the BOARD, said RAILROAD, in error, failed to deduct the sum of $736.67 from the amount so remitted to the UNITED

[1] The courts have uniformly construed the Tucker Act to provide that the implied contract must be one implied in fact as opposed to one implied in law. *Goodyear Tire & Rubber Co.* v. *United States*, 276 U.S. 287.

> STATES. This latter sum of $736.67 should have been paid over by RAILROAD to the plaintiffs rather than to the BOARD since it represents moneys due the plaintiffs out of the fund of $2,210.00 in consideration of the services rendered by the plaintiffs to the Railroad Retirement Board and the UNITED STATES in creating such fund by securing for the Railroad Retirement Board and the UNITED STATES said sum of $2,210.00.

When the government moved to dismiss the complaint for lack of jurisdiction of the subject matter, petitioners did not argue that their claim rested upon the RUIA or amend the complaint to lay a foundation for this contention. The district court therefore properly granted the government's motion, holding (190 F. Supp. at 161):

> * * * Since there is no statutory authority, their recovery must be based on a quantum meruit basis or on principles of implied contract or of quasi-contract, or on the equitable principle of having created the fund.
>
> It is quite clear from reading the complaint that if the plaintiffs have any claim against the United States, it is on the basis of a contract implied in law as opposed to a contract implied in fact, or on the equitable principle of having created the fund. The United States has not consented to be sued in this action and the federal jurisdiction recognizes no such equitable right. Therefore the District Court has no jurisdiction over this action.

In the court of appeals petitioners attempted to remedy the jurisdictional flaw created by their com-

plaint by arguing that the district court misunderstood the theory of their case. They urged there (Pet. App. 14), just as they assert in the petition that the action falls within the jurisdiction given by the Tucker Act over claims founded upon an act of Congress since the suit is for recovery of funds paid to the Railroad Retirement Board "by reason of a misinterpretation of the provisions of the Railroad Unemployment Insurance Act * * *" (Pet. 2; Appellants' Brief, p. 1; see also Pet. 4, 5, 6, 8-9). This contention necessarily requires the Court to go beyond the face of the complaint and should be rejected under *Gully* v. *First National Bank*, *supra* at 113.

Even in argument, however, petitioners have failed to show that their claim is founded upon the RUIA. The decisive consideration in determining whether a claim is founded upon an act of Congress is the federal nature of the right to be established. *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476; *Gully* v. *First National Bank*, *supra*. The claim against the United States must be founded upon a provision of a federal law which "conditions and determines its validity." *Christie Street Commission Co.* v. *United States*, 136 Fed. 326, 331 (C.A. 8); *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28; *Dismuke* v. *United States*, 297 U.S. 167; *United States* v. *Ohio Oil Co.*, 163 F. 2d 633, 639 (C.A. 10), *certiorari denied*, 333 U.S. 833; *Jackson* v. *United States*, 129 F. Supp. 537, 540 (D. Utah).

The validity of petitioners' claim is not "conditioned or determined" by the RUIA or by any act of

Congress. Petitioners candidly recognized this fact in their brief to the court of appeals (Appellants' Brief, p. 19):

> The present controversy has arisen only because § 12(o) of the Railroad Unemployment Insurance Act does not address itself to the question in issue. Although this is a matter about which Congress may legislate, the Act neither grants nor denies the right of an attorney recovering funds for the Railroad Retirement Board to reasonable compensation for the benefits he has conferred upon the Board.

To the same effect, see Pet. 10. Admittedly being unable to found their claim upon the provisions of an act of Congress, petitioners rely on what they conceive to be the general "equitable principles usually applicable to a subrogated fund * * *"— "* * * a cardinal rule of equity to impose the burdens of producing a common recovery proportionately upon those who benefit from the recovery" (Pet. 10). As the court of appeals noted, however, 'The minute this argument is made * * * it puts the claim outside the Tucker Act altogether. The claim is then based not upon a statute of the United States, but rather on general equitable principles. There is no basis in the Tucker Act at all for the assertion of these. * * *" (Pet. App. 15).

This conclusion is not affected by petitioners' contention that the Congressional silence in the RUIA on the matter of attorneys' fees raises a question as to whether "equitable principles usually applicable to a subrogated fund" should be applied here and therefore the instant litigation "involves a dispute re-

specting the construction and effect of § 12(o) of the RUIA" (Pet. 9–10). For at most, this is to say that the Congressional silence permits a reference to general equitable principles. Even if this could be said (but see pp. 10–12, *infra*), the fact remains that the claim is then determined by such equitable principles and not by an act of Congress. *Gully* v. *First National Bank, supra.*[2]

Nor is there substance to petitioners' assertion that it is enough for Tucker Act jurisdiction that the government received the payment under color of a federal statute and that the determination of the litigation involves a federal question. In all of the refund cases cited by them (Pet. 6) which involved Tucker Act jurisdiction,[3] the validity or invalidity of the claim on the merits was dependent upon an act of Congress. Thus, they have no application where, as here, there is an explicit and necessary disavowal that the claim is conditioned upon Section 12(o) of the RUIA or any other provision of an act of Congress.

2. There is no greater validity to petitioners' claim on its merits. As petitioners note (Pet. 10), the RUIA does not expressly provide that attorneys' fees may be charged against the money returned to the

---

[2] The Court in *Gully* rejected a similar argument advanced in the context of a question whether a particular claim was one "arising under" a law of the United States. There is no difference between claims "arising under" and those "founded upon" a federal law. *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32.

[3] In the cases cited by petitioners at page 8 of their petition, Tucker Act jurisdiction was not involved.

Board in satisfaction of its lien under Section 12 (o) of the RUIA for sickness benefits paid to a railroad employee. Petitioners insist that this Court should draw from the fact that the RUIA does not expressly prohibit such a charge an inference that Congress intended to permit it where sanctioned by equitable principles. Such an inference, however, is not permissible for several reasons.

As the court of appeals noted (Pet. App. 16), where Congress has desired to permit a charge for attorneys' fees against the subrogee's claim, it has expressly so provided. See, e.g., 5 U.S.C. 777 and 33 U.S.C. 933. Particularly in light of the magnitude of the sickness benefit program established by the RUIA,* the absence of such a provision here must be deemed deliberate.

The language of Section 12(o) of the RUIA affirmatively reflects a legislative purpose not to permit a charge for attorneys' fees against the lien created by that section. In pertinent part it provides (emphasis added):

> The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee, * * * on account of any liability * * * based upon such infirmity, *to the extent that it will have paid or will pay benefits*

* As of the end of fiscal year 1958-1959, cumulative sickness and maternity benefits disbursed by the Board equalled $5 billion; as of the same date cumulative Section 12(o) reimbursement totaled $39,294,000. Annual Report, Railroad Retirement Board, 1959, p. 1; Monthly Review, Railroad Retirement Board, for August of the fiscal years 1949 through 1959.

> *for days of sickness resulting from such infirmity.* Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such claim or right * * * and any sum or damages paid under such right or claim, *to the extent of* the amount to which the Board is entitled by way of reimbursement.

Contrary to petitioners' assertion (Pet. 11), there is nothing ambiguous about this language. It means exactly what it says. The words "to the extent of" in the last sentence refer to the "amount to which the Board is entitled by way of reimbursement" and that amount, in turn, is defined by the preceding sentence which provides that the Board is entitled to reimbursement out of the "sum or damages" recovered from the tortfeasor, "to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity." In other words, the Board is entitled to get back what it has paid out in sickness benefits.

Under petitioners' theory, the Board could not recover its payments. For, according to them, in each case in which the Board asserts a lien under Section 12(o) for sickness benefits paid, the employee's attorney could deplete the amount of the Board's reimbursement by asserting a right to a fee out of the lien amount for his efforts in having brought about the 'recovery.' This would be contrary to the express directive of the statute which provides that the Board be reimbursed "from any sum or damages paid * * * to the extent that it will have paid or will pay benefits for days of sickness * * *." Congress

cannot have intended the opposite result urged by petitioners. Cf. *United States* v. *Atlantic Coast Line R.R. Co.*, 237 F. 2d 137, 139 (C.A. 4).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
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Assistant Attorney General.
ALAN S. ROSENTHAL,
JEROME I. LEVINSON,
Attorneys.

MARCH 1962.

APPENDIX

COMPLAINT

1. The plaintiffs, B. NATHANIEL RICHTER, JOSEPH S. LORD, III, and ELWOOD S. LEVY, are residents and citizens of Pennsylvania, engaged in the practice of law and are duly licensed under the laws of the Commonwealth of Pennsylvania and are admitted to practice before the Courts of Philadelphia County and various Courts of Pennsylvania and of the United States.

2. The defendant is the UNITED STATES OF AMERICA among whose agencies is the Railroad Retirement Board (hereinafter sometimes referred to as "BOARD") established as an independent board in the executive branch of the government by § 10 of the Railroad Retirement Act of August 29, 1935, 49 Stat. 973, as amended, at 45 U.S.C. 228(j)(a).

3. Jurisdiction is based upon Title 28, United States Code § 1346.

4. On or about October 24, 1956, at Philadelphia, Pennsylvania, Peter J. Urban (hereinafter sometimes referred to as "EMPLOYEE") did sustain injuries while engaged in the course of his employment by the Pennsylvania Railroad Company (hereinafter sometimes referred to as "RAILROAD").

5. On June 25, 1957, plaintiffs, as attorneys for EMPLOYEE did, pursuant to the provisions of the Employers' Liability Act (Act of April 22, 1908, C. 149, 35 *Stat.* 65; 45 U.S.C. 51 *et seq.*, as amended) initiate an action against RAILROAD in the Court of Common Pleas No. 7 of Philadelphia County, as of No. 2605,

June Term, 1957, and during March of 1960 upon settlement of this litigation and claim did effectuate a gross recovery of $16,800.

6. For the purpose of effectuating said recovery plaintiffs were retained as counsel by EMPLOYEE on a contingent fee basis.

7. On or about March 3, 1960, plaintiffs received from RAILROAD voucher No. 10360 in the sum of $14,598.00 made payable to plaintiffs and EMPLOYEE in settlement of the claim of EMPLOYEE against RAILROAD for damages sustained in said accident of October 24, 1956. This voucher specified that the sum of $2,210.00 had been deducted by the RAILROAD from the $16,800.00 otherwise due EMPLOYEE and plaintiffs and paid over to the Railroad Retirement Board in accordance with a lien filed by said BOARD with the RAILROAD for benefits previously paid by the UNITED STATES through the BOARD to EMPLOYEE on account of disability arising from said accident. Said sum of $2,210.00 had in fact been paid by RAILROAD to the UNITED STATES through the BOARD as set forth in said voucher.

8. All services rendered by the plaintiffs in securing the aforesaid recovery and settlement with the RAILROAD for damages arising out of the aforementioned accident of October 24, 1956, were rendered by plaintiffs within the Commonwealth of Pennsylvania.

9. EMPLOYEE paid a contingent fee to plaintiffs in the sum of $4,639.41 for services rendered by plaintiffs to EMPLOYEE in securing for EMPLOYEE the net recovery of $13,918.25. Said net recovery being equal to the gross recovery of $16,800.00 less litigation expenses and costs of $671.75 and also the $2,210.00 paid by RAILROAD directly to the UNITED STATES through the Railroad Retirement Board as set forth in paragraph 7 hereof.

10. In paying over the sum of $2,210.00 to the UNITED STATES through the BOARD, said RAILROAD, in error, failed to deduct the sum of $736.67 from the amount so remitted to the UNITED STATES. This latter sum of $736.67 should have been paid over by RAILROAD to the plaintiffs rather than to the BOARD since it represents moneys due the plaintiffs out of the fund of $2,210.00 in consideration of the services rendered by the plaintiffs to the Railroad Retirement Board and the UNITED STATES in creating said fund by securing for the Railroad Retirement Board and the UNITED STATES said sum of $2,210.00.

11. The reasonable and proper value of the services rendered by the plaintiffs, for the benefit of the UNITED STATES in effectuating the aforementioned recovery from RAILROAD and creating said fund of $2,210.00 and resulting in said sum being paid over by RAILROAD to the UNITED STATES is Seven Hundred Thirty-six Dollars and Sixty-seven Cents ($736.67).

12. On or about March 30, 1960, plaintiffs advised the Railroad Retirement Board of the error of RAILROAD in making the payment of $736.67 to the BOARD rather than to plaintiffs and demanded that said moneys be paid over to the plaintiffs.

13. On or about April 5, 1960, plaintiffs were advised by the Regional Director of the Railroad Retirement Board at New York City that the UNITED STATES would not pay over to plaintiffs the sum of $736.67 as demanded by plaintiffs in the letter of demand referred to in paragraph 12 hereof.

Wherefore, plaintiffs demand from the UNITED STATES the sum of $736.67 together with interest thereon from March 3, 1960.

/s/ MARVIN GARFINKEL,
Marvin Garfinkel, Esq., for
NARIN, GARFINKEL and MANN,
Attorney for Plaintiffs.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONERS' REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Reply Argument.

The Government in its Brief in Opposition to the Petition for Certiorari implies that Petitioners failed to argue in the District Court that jurisdiction was based on the "Act of Congress" criterion of 28 U. S. C. 1346(a)(2). Petitioners filed two briefs in the District Court. The initial brief cited Section 12(o) of the RUIA as the determinative statutory provision (3), and Petitioners devoted a substantial portion of both their initial brief (4-16) and their reply brief (1-4, 5-10, 17-20, 36-41) in the District Court to the point that for Tucker Act jurisdictional purposes this case must be characterized as one "founded upon an act of Congress" since it involves the interpretation and application of Section 12(o) of the RUIA and

involves a demand for payment back from the United States of funds paid to it under color of the RUIA. For instance, at pages 14 and 15 of their initial brief filed in the District Court Petitioners stated that:

> "The term 'founded on an Act of Congress' has been given a technical construction by the case law that, in certain situations, is possibly somewhat broader than might be otherwise immediately apparent. Since the instant action seeks a payment out of the Treasury of moneys previously paid the United States pursuant to or under color of an Act of Congress, it is, for Tucker Act jurisdictional purposes, a claim founded upon an Act of Congress."

At pages 15 and 16 of the same brief Petitioners stated:

> "A determination of the instant case on its merits requires an interpretation of the provisions of Section 12(o) of the Railroad Unemployment Insurance Act. This is the section pursuant to which the original payments were made to the United States. . . . The government's position rests on its interpretation of the Railroad Unemployment Insurance Act and the 'correct decision' of this case depends on the construction of 'that Act'. *Cohens v. Virginia, supra.* Since the claim of the plaintiffs is dependent upon the application or interpretation of an Act of Congress, it is, for Tucker Act jurisdictional purposes, a claim founded upon an Act of Congress."

Consistent with modern Federal pleading practice, the complaint supports Petitioners' jurisdictional allegations. The principle of *Gully v. First National Bank*, 299 U. S. 109 (1936) pertains to Federal Question jurisdiction of the District Courts and has never been applied as a standard of Tucker Act jurisdiction. In the *Gully* opinion itself,

Justice Cardozo pointed out (299 U. S. 109, 117) the danger of transposing the judicial gloss ascribed to a particular term in one context to a different context in which the policy considerations differ.

Respectfully submitted,

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STEPHEN B. NARIN,
THEODORE R. MANN,
Attorneys for Petitioners.

March 15, 1962